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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209272

DATE: November 4, 1982

MATTER OF: Emerson Electric Company, Environmental
Products Division

DIGEST:

1. An agency was not required to consider the percentage of recovered materials offered by a bidder in evaluating bids since that factor was not an objectively determinable element of cost identified in the solicitation as a factor to be evaluated in the selection of the contractor.
2. The Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (1976 and Supp. IV 1980), contains no requirement that the percentage of recovered materials offered by a bidder be taken into account in determining the low evaluated bid under a solicitation.

Emerson Electric Company, Environmental Protection Division protests the General Services Administration's (GSA) award of a contract to Patton Electric Company for items 48-59 under invitation for bids (IFB) No. 9FCC-OKH-A-A06121-82 for electric fans. We summarily deny the protest.

Emerson was not the low bidder on the items in question, but contends it nevertheless should have received the award because its bid was the most advantageous to the Government, price and other factors considered. Emerson believes this is so because its bid on the items was very close in price to Patton's, and it also agreed to supply fans composed of 10 percent recovered materials, while Patton agreed to supply fans containing no recovered materials. The protester contends that both the terms of the solicitation and the Resource Conservation and Recovery Act (The Act), 42 U.S.C. § 6901 et seq. (1976 and Supp. IV 1980), require that the percentage of recovered materials offered by a bidder be taken into consideration in evaluating bids.

The solicitation provides as follows:

"Recovered Materials Certification

(a) Public Law 94-580, Resource Conservation and Recovery Act of 1976, requires Federal agencies to procure items of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition * * *.

(b) To provide a basis for making future determinations as to percentages of recovered materials as defined in paragraph (a) which can be reasonably expected, you are encouraged to furnish the following information for each item on which you submit an offer. * * * By signing the offer, the offeror certifies that the percentage shown will be supplied during the life of the contract."

The "Recovered Materials Certification" clause thus encourages bidders to indicate the percentage of recovered materials they will supply. It neither requires bidders to supply this information nor provides for its consideration in evaluating bids. In fact, the clause specifically indicates that the purpose of the information request is to provide a basis for making future determinations as to percentages of recovered materials which can reasonably be expected.

In addition, it is apparent that the protester misconstrues the requirement that award under a formally advertised procurement be made to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. We have consistently interpreted that language, which appears in Federal Procurement Regulations § 1-2.407-1(a) (1964 ed.) and 41 U.S.C. § 253(b) (1976), to require award on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. 37 Comp. Gen. 550 (1958); Central Washington University, B-200316, August 18, 1981, 81-2 CPD 152. Thus, in the context of a formally advertised procurement, "other factors" are objectively determinable elements of cost identified in the solicitation as factors to be evaluated in the selection of a contractor. Id. Since usage of recovered materials was not an objectively

determinable element of cost identified as a factor to be evaluated here, it could not properly be taken into consideration in determining the most advantageous bid.

We also note that contrary to Emerson's assertion, there is nothing in the Act which requires an agency to take the percentage of recovered materials offered by a bidder into account in determining the low evaluated bid. Rather, the statute provides as follows:

"(1) After the date specified in applicable guidelines prepared [by the Administrator of the Environmental Protection Agency (EPA)], each procuring agency which procures any items designated in such guidelines shall procure such items composed of the highest percentage of recovered materials practicable * * *.

* * * * *

(3) After the date specified in [the] guidelines, * * * contracting officers shall require that vendors:

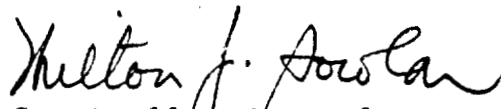
"(A) certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements and

(B) estimate the percentage of the total material utilized for the performance of the contract which is recovered materials."
42 U.S.C. § 6962(c)(1),(3) (Supp. IV 1980).

Further, as Emerson itself admits, the Administrator has not yet promulgated the required guidelines (a matter which has been of concern to our audit staff--see our report "Federal Industrial Targets and Procurement Guidelines Programs Are Not Encouraging Recycling and Have Contract Problems," EMD-81-7, December 5, 1980). Consequently, there are no items designated for procurement under the statute. While Emerson asserts that agencies nevertheless must comply with the requirement that they procure items composed of the highest percentage of recovered materials practicable, we disagree. By its own terms, that requirement does not become effective until after the date specified in the guidelines.

Since it is apparent from Emerson's initial submission that its protest is without merit, we have reached our decision without requesting an agency report and without the conference requested by the protester. Northern Illinois University, B-194055, March 15, 1979, 79-1 CPD 184.

The protest is summarily denied.

for 
Comptroller General
of the United States

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-208575

DATE: November 1, 1982

MATTER OF: Cannon Division of ITT Corp.

DIGEST:

Protest filed with GAO more than 10 days after protester learns of initial adverse agency action on protest filed with agency is dismissed as untimely and we do not consider the issue raised as a significant issue under our Procedures to warrant invoking the exception to consideration of otherwise untimely protests.

International Telephone and Telegraph Corporation, Cannon Electric Division (ITT) protests the award of a contract by Unicor, Federal Prison Industries, Inc., United States Department of Justice (FPI) to Bendix Electrical Components Division, under request for proposals (RFP) No. 27-P1-1624-E82. ITT contends that the contract already had been awarded to it under contract No. 27-P1-1390-NEG on June 8, 1982, and that it was improper to request another round of best and final offers. We dismiss the protest as untimely.

The documents submitted by the protester show that by telex dated June 22, 1982, FPI denied a protest by ITT concerning the reopening of negotiations and a new best and final offer due by July 7, 1982. By letter dated July 8, 1982, ITT again protested to the agency which denied this protest by letter of July 16, 1982. Subsequently, on August 11, 1982, ITT filed this protest with our Office on the basis that the contract already had been awarded and that an auction had occurred.

Under our Bid Protest Procedures, where a protester initially files a protest with the contracting agency, any subsequent protest to our Office will be considered if filed within 10 working days from notification of or actual or constructive knowledge of adverse agency action on the protest. 4 C.F.R. § 21.2(a) (1982). As this protest was not filed within 10 working days from June 28, 1982, the date the protester received the June 22 letter from the contracting officer initially denying its protest, the protest to our Office on August 11, 1982, is clearly untimely.

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In supplementing its original protest to our Office, ITT contends that even if untimely, the protest should be considered as a significant issue under 4 C.F.R. § 21.2(c). The significant issue exception to our timeliness rules, which is exercised sparingly so that our timeliness standards do not become meaningless, contemplates a protest which involves a procurement principle of widespread interest or which affects a broad class of procurements. Edron, Inc.--Reconsideration, B-207353.2, September 8, 1982, 82-2 CPD 207. In our opinion, the issue in this protest merely concerns the conduct of this procurement. As a consequence, the issue is not of sufficient impact to warrant review under our significant issue exception. See Comprehensive Health Services, Inc., B-201725, May 20, 1981, 81-1 CPD 394.

Accordingly, the protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel